92-1058

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

VICKIE C. STRICKLAND
and LELAND CREEL,
Petitioners

VS.

MOTORS INSURANCE CORPORATION (MIC),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In affirming summary judgement on an issue of state law in this diversity case, did the federal court below improperly pre-empt the Petitioners from invoking the decisional law of the State of Mississippi, and thereby deprive Petitioners of their Seventh Amendment right to trial by jury?

2. When an insurance company refuses to pay a claim on a policy holder which it had failed to notify the policyholder was being canceled, and later lies abouts its reasons therefor, should the issue of punitive damages be submitted to the jury?

3. Did the court below correctly apply this Court's standard of review on summary judgments and punitive damages?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below, as required by Rule 24.1(b) of the rules of this court.

1. Vicki C. Strickland (now Barnett), Plaintiff - Appellant in the court below;

2. Leland Creel, Plaintiff - Appellant in the court below;

3. Motors Insurance Corporation (MIC), Defendant - Appellee in the court below;

4. General Motors Acceptance Corporation (GMAC), Defendant in the court below; and

5. Martin Motor Company, Defendant in the court below.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO.

VICKIE C. STRICKLAND
and LELAND CREEL, Petitioners

VERSUS

MOTORS INSURANCE CORPORATION (MIC) Respondent

On a Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Your Petitioners, Vicki C. Strickland and Leland Creel, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decisions of the United States Court of Appeals for the Fifth Circuit rendered on September 2, 1992, on direct appeal and on October 7, 1992, on Petition for Rehearing and Rehearing En Banc, which reversed a summary judgment of the United States District Court for the Southern District of Mississippi in favor of Respondent, Motors Insurance Corporation, but which affirmed the court below on the issue of whether Petitioners should be allowed to seek punitive damages against the Respondent for its wrongful acts.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1254(1), for the purpose of considering, under Rule 17 of the Supreme Court Rules, whether to grant a writ of certiorari.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, dated September 2, 1992, is attachment A in the appendix to this brief. The Order of the United States Court of Appeals, Fifth Circuit, denying the Petition for Rehearing and Rehearing En Banc, dated October 7, 1992, is included as attachment B in the appendix.

The mandate of the court below, dated September 2, 1992, but not yet issued pending the decision of this Court, is included as attachment C in the appendix.

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

This case was originally filed in state court against the dealer from whom the petitioners purchased the car in question, Martin Motor Company; the finance company, General Motors Acceptance Corporation (GMAC); and the insurance company providing comprehensive coverage on this car during the period of the mortgage, Motors Insurance Company (MIC).

After the dealership was dismissed, the remaining defendants removed to the United States District Court for the Southern District of Mississippi, on the basis of diversity of citizenship, 28 U.S.C. §§ 1332, 1441.

The district granted summary judgment for GMAC, and also granted a separate motion by MIC. The case was appealed to the Fifth Circuit, and the summary judgment as to GMAC was affirmed, but the case was remanded for consideration of the summary judgment as to MIC. The District Court was instructed to make a determination as to whether notice of expiration of coverage was, in fact, sent, and if it was not, to deny the summary

judgment motion of MIC. The District Court below, as noted in Footnote 1 of the most recent opinion in this case, did determine that MIC had not sent the requisite notice; however, the court went ahead and granted summary judgment on its behalf anyway.

This case came before the Fifth Circuit for the second time, and the District Court was again reversed. The Fifth Circuit's opinion in this case quite correctly states that the notice provisions of Miss. Code Ann., §§ 83-11-5, 83-11-7 and 83-11-9, are clear and unexceptional. If notice is not given to the policyholder as required by law, the coverage continues in force. However, in spite of numerous decisions construing these statutes, the Court held that there was an ambiguity as to the insurance company's duty to give notice and, therefore, affirmed the summary judgment of the court below on the issue of punitive damages.

Petitioners have filed this appeal for consideration of the dismissal of their claim for punitive damages.

Statement of Facts

The facts have been accurately set forth in the Fifth Circuit's opinion which has been added as attachment A in the appendix. However, for the sake of discussion, the following essential facts are given as a point of reference. Vicki C. Strickland and her grandfather, Leland Creel, purchased a used car from a local dealership in Laurel, Mississippi, which was financed by GMAC, and with comprehensive coverage by MIC. Every year, year in and year out, GMAC purchased coverage from MIC and added the premiums to the monthly financing payments on the car. Petitioner Strickland was justified in believing that the coverage would be added automatically the third year, which apparently it was not. During the period of lapse, the car was wrecked, and it was subsequently repossed by GMAC. MIC continued to deny coverage on the basis that the coverage had expired. However, no notice was ever given to the appellants that the coverage was about to expire, as required by Miss. Code Ann., §§ 83-11-5, 83-11-7 and 83-11-9. The Fifth Circuit's opinion in this case notes the clarity and unexceptional nature of these statutes, based on clear precedents; however, the Court affirmed the judgment of

the court below dismissing Petitioners' claim for punitive damages.

After your Petitioners were unable to get any satisfactory response from Respondent MIC regarding the denial of their claims, they contacted Attorney William E. Phillips of Laurel, Mississippi. Mr. Phillips wrote to both GMAC and MIC, inquiring as to the reason for their failure to honor the Petitioners' claim. (R. 783-784). From that point on, both GMAC and MIC embarked upon a disingenuous course of conduct marked by mendacity and outright falsehood, intended to deceive their own insureds and their insureds' counsel, and further to attempt an involved "coverup" of their misdeeds.

The supervisor of Respondent MIC's office in Jackson, Mississippi, responded to Mr. Phillips' letter of inquiry and stated the following:

> We had renewed his policy previously and offered to renew it in December, 1985 when it expired. Since there was no response to our solicitation, and no payment received, coverage expired 12/29/85. We are sorry to hear Ms. Strickland has had a loss, but we had no coverage in force in May, 1986. Perhaps she had her insurance with some other company. If there is any further information we can provide, please call me. (R. 785)

This letter, in its entirety, was false and was known to be false at the time it was written by Respondent MIC. There had been no solicitation, and the author of this letter knew that there had not been, because he had conducted an investigation as to the reason for denial of the claim. That investigation had revealed that the true reason for nonrenewal of Petitioners' coverage was due to a computer error and the communication system between MIC and its agent, GMAC. This was known as the Financed Insurance Renewal or "FIR" system.

In response to the aforesaid information to "call me," Attorney Phillips telephoned and requested further investigation from Respondent MIC's Supervisor Weiss, who thereupon sent the following letter to Petitioners' counsel:

> As we discussed by phone, we [MIC] had offered to renew your client's policy, but when she did not respond or send the premium, we canceled for non-payment.
>
> I have enclosed our copy of the extension certificate, as well as signed copies of our correspondence to GMAC and GMAC's correspondence to MIC. You will have to contact GMAC regarding why they did not add the premium to the customer's account. They had originally agreed to add if the customer approved.
>
> If you have any further questions, please call me. (R. 787)

Again, MIC lied when it said that they had offered to renew the policy. The day after sending this disingenuous letter to Petitioners' counsel, MIC Supervisor Weiss wrote to GMAC Supervisor Tim Brantley in Meridian, Mississippi, the following letter:

> See corres. attached. Atty. Phillips called me 9/2 & wanted proof that we had notified c/s [customer] of our willingness to renew - even though I explained to him that we had no requirement to do so.
> It is obvious that if the FIR system worked right, we would have been on the risk and avoided all this. But your f/u [follow-up] was behind and it didn't automatically get added. However, the FIR system is for GMAC's protection, not the c/s [customer's]. I do not recommend that we discuss any settlement, as it is the c/s [customer's] responsibility to protect the collateral. S/Bill Weiss. (R. 786).

GMAC Supervisor Brantley thereupon placed a candid memo in GMAC's files indicating that GMAC had erroneously sent the renewal notice to MIC rather than to the customer, and for that reason the coverage was not automatically renewed. (R. 788)

Additionally, MIC Supervisr Weiss admitted in his sworn deposition that he had discovered the GMAC renewal form in the Petitioner's file prior to writing Mr. Phillips the letter quoted above. Mr. Weiss later admitted that the failure to renew the policy was the result of a computer error. (R. 1014-1015). No notice of this nonrenewal was ever sent to the Petitioners; instead, the Respondent and its agent engaged in a course of deception and cover-up.

SUMMARY OF THE ARGUMENT

The state statutes in this case, Miss. Code Ann. §§ 83-11-5, 83-11-7 and 83-11-9 clearly and unmistakably require that insurers notify policy holders in writing before canceling coverage; otherwise, the coverage remains in force.

This is a matter of well-settled law, having been the subject of quite a few decisions of the Supreme Court of Mississippi and of the United States Court of Appeals, Fifth Circuit. It is not a case of first impression. The court below erred in affirming the summary judgment dismissing Appellants' claim for punitive damages. The egregious conduct of the insurance company, in knowingly canceling Petitioners' coverage after it was notified that the automobile in question had been in a wreck, should have subjected it to punitive damages. This type of conduct by insurance companies should not be tolerated.

Moreover, the opinion of the court below, in affirming summary judgment on this issue, is directly contradictory to the clear explanations of this Court of the standard for summary judgments.

REASONS RELIED ON FOR GRANTING THE WRIT

The Court below affirmed the District Judge's grant of summary judgment in favor of MIC on the issue of punitive damages. The Court said:

> Mississippi's insurance law allows punitive damages only where an insurer has no arguable or legitimate reason for denying coverage. [Citations omitted] *The statutory language here is less than clear* and MCI's interpretation of the statute is not requiring notice under these facts does not make it susceptible to punitive damages. [Emphasis added]

These concluding paragraphs came at the end of the seven-page opinion most of which was taken up by a discussion of how clear the statutory notice requirement was.

I. THE COURT BELOW, IN AFFIRMING SUMMARY JUDGMENT ON ISSUE OF STATE LAW IN THIS DIVERSITY CASE, IMPROPERLY PRE-EMPTED THE PETITIONERS FROM INVOKING THE DECISIONAL LAW OF THE STATE OF MISSISSIPPI, AND THEREBY DEPRIVED PETITIONERS OF THEIR SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

The United States Court of Appeals for the Fifth Circuit reversed the United States District Court's grant of summary judgment in favor of the Respondent in all respects, except punitive damages. The court below affirmed summary judgment in favor of Respondent on the issue of punitive damages. As seen in the case law below, this was an improper pre-emption of the Petitioners' right to trial by jury, which is well settled by Amendment Seven to the Constitution of the United States:

> In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

In *Lyon v. Mutual Benefit Health and Accident Assoc.*, 305 U.S. 484, 83 L.Ed. 303 (1939), this court said it would "scrupulously safeguard" the constitutional right of trial by jury. The thrust of the Seventh Amendment is to preserve the right to jury trial as it existed in 1791. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 58 L.Ed. 2d 552 (1979).

Punitive damages undeniably arise from the common law. Your Petitioners do not aver that every instance in which punitive damages are demanded would be inappropriate for summary judgment, but they are surely not appropriate where the issue turns on a matter of construction and clarity of state law.

Whether a litigant has a right to trial by jury depends on the nature of the issue to be tried, rather than the character of the overall action; the "legal" nature of the issue is determination by considering (1) custom with reference to such questions before the merger of law and equity, (2) the remedy sought, and (3) practical abilities and limitations of juries. *Ross v. Bernhard*, 396 U.S. 531, 24 L.Ed. 2d 729 (1970).

In the case at bar, the Fifth Circuit affirmed the lower court's grant of summary judgment in favor of the insurance company, on the basis that the statutory requirement of written notice was less than clear, and that the insurance company's interpretation of that statute as not requiring notice under these circumstances would not make it susceptible to punitive damages. This, however, is a matter interpretation, which should have been left to the jury.

There is no federal common law, *United States v. Ladner*, 238 F.Supp. 895 (S.D. Miss. 1965), and in diversity cases, "the law to be applied...is the law of the state...declared by its legislature in a statute or by its highest court in a decision." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 82, L.Ed. 1188, 1194 (1937).

In this case, and in many others, the district court, rather than adhering to the unmistakable language of prior decisions of the Supreme Court of Mississippi, relied instead on its own precedents in *Gorman v. Southeastern Fidelity Ins. Co.*, 621 F. Supp 33 (S.D. Miss. 1985) and *Stephen R. Ward, Inc. v. United States Fidelity and Guaranty Co.*, 681 F.Supp. 389

(S.D. Miss. 1988). This is an example of the principal of *stare decisis* gone awry. While a court is traditionally bound by its own precedents, the courts below inappropriately usurped a function which is the exclusive province of the state courts. If there were an ambiguity as to the obligations of Respondent under the statute, that matter should have been submitted to the Supreme Court of Mississippi for an advisory opinion, as your Petitioners had requested. Had it done so, or if it had looked strictly at the decisional law of Mississippi, and not at its own explication of those decisions, it would have found that the noticed requirement under state law was clear and unmistakable, and that this issue had been well settled.

II. THIS WAS NOT A CASE OF FIRST IMPRESSION. THE REQUIREMENT OF WRITTEN NOTICE BEFORE CANCELING COVERAGE IS A MATTER WELL SETTLED UNDER MISSISSIPPI LAW.

The Supreme Court of Mississippi and the United States Court of Appeals, Fifth Circuit, on numerous occasions have undertaken to construe the statutes in question, Miss. Code Ann. §§ 83-11-5, 83-11-7 and 83-11-9, requiring that insurers notify policy holders in writing before canceling coverage; otherwise, the policy remains in force. These statutes are set forth in full in the addendum to this petition.

It was perhaps a case of first impression twenty years ago when the Supreme Court of Mississippi addressed it in *Transamerica Ins. Co. v. Bank of Mantee*, 241 So. 2d 822 (Miss, 1972). There the issue of notice requirement was addressed by the court in the context of an insurance agent's testimony that notice was sent. The Mississippi court held:

> The testimony of an insurance agent, like the testimony of any other witness, is to be weighed and evaluated by the trier of facts, taking into consideration other testimony and the surrounding circumstances in the case, and, if

> the surrounding circumstances are such as to outweigh the statement of an insurance agent that he mailed *the required notice*, the jury or trier of facts is not bound to accept the agent's statement simply because the agent so testified.

241 So. 2d at 825 [emphasis added).

The requirement of notice was next addressed in *Black v. Fidelity & Guaranty Ins. Underwriters*, 582 F.2d 984 (5th Cir. 1978), in which the court below said:

> Accordingly, we hold that § 83-11-5 requires that notice of cancellation for non-payment of premium to be given at least ten days before the effective date of the cancellation and that...if cancellation is for a reason other than non-payment, the notice may be mailed or delivered at least twenty days before the cancellation date. The district court's grant of partial summary judgment on the issue of defendant's liability under the policy is thus affirmed.

582 F.2d at 988.

In *Black*, the Fifth Circuit held that the issue of punitive damages should have been submitted to the jury, and reversed the district court's grant of a directed verdict for the insurance company on that issue, and remanded for a new trial limited to whether plaintiff should be awarded punitive damages.

The issue was next addressed in *Willis v. Mississippi Farm Bureau Mut. Ins. Co.*, 481 So. 2d 256 (Miss. 1985), in which the court construed Miss. Code Ann. § 83-11-5, 83-11-7 and 83-11-9. The court held that coverage could not be terminated without the requisite written notice, and that this requirement was satisfied by including this notification in a statement that the renewal premium was due.

In *Henderson v. United States Fidelity and Guaranty Co.*, 620 F.2d 530 (5th Cir. 1980), the court explicitly said, "Mississippi law provides that an insurer cannot refuse to renew a policy unless it gives thirty days advance notice. Miss. Code Ann., § 83-11-7 (1972)." 620 F.2d at 533. The court went on to say:

> Notice is usually a jury question in Mississippi. Notice of nonrenewal or cancellation can be proved by a production of a certificate of mailing. Miss. Code, § 83-11-9 (1972), but no such certificate was produced at this trial. In interpreting the language of insurance contracts, the Supreme Court of Mississippi has held that the agent's testimony that the letter was mailed and a post office certificate are adequate proof of notice. [Citations omitted]. When a certificate is not submitted, however, the jury is not required to believe that notice was sent or received.

620 F.2d at 535.

The Defendant in that case claimed that it had sent timely notice of non-renewal, though it was not able to produce the statutorily-required certificate of mailing. The jury manifestly found that notice was not sent, and the court remanded for trial on punitive damages for failure to pay the claim.

On remand, the jury awarded punitive damages and the insurance company appealed. The Fifth Circuit affirmed that award, stating:

> USF&G argues that its good faith subjective belief of the policy's cancellation remains relevant to the issue of punitive damages. Attractive as this argument appears, it does not withstand analysis. First, USF&G was not entitled to predicate the existence of a good faith subjective belief upon acts previously found not to have occurred. Second, even if USF&G did believe that the notice was sent, that belief was not dispositive. Coverage was previously decided and, on remand, the issue went to USF&G's failure to produce the $50,000.00 policy in the face of the interrogatories and requests for all of Henderson's policies. A belief that the policy had been canceled was no explanation for denying that it existed.

695 F.2d at 113.

A petition for certiorari to this Court from the foregoing decision was denied. *Henderson*, 449 U.S. 1034, 66 L.Ed. 2d 495 (1980).

The Fifth Circuit again addressed Miss. Code Ann. § 83-11-7 in *Estate of Beinhauer v. Aetna Casualty and Surety Co.*, 893 F.2d 782 (5th Cir. 1990), wherein the court again made the unmistakable requirement of notice clear.

In *Stephen R. Ward, Inc., v. United States Fidelity and Guaranty Co.*, 681 F. Supp. 398 (S.D. Miss. 1980), the court denied a motion for summary judgment both as to liability and punitive damages, even though the underlying claim was more than a year after the policy in question had lapsed, where the insurance company had failed to give notice before or even after the policy period had ended. The court said:

> With regard to the overall issue of punitive damages in this case, it must be acknowledge that Mississippi law directs that 'punitive damages are not recoverable for the breach of contract unless such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort.' [Citations omitted] However, application of the above requires a determination of whether the insurance company had a justifable reason or arguable basis for denying a valid claim.
>
> At this time, this court is unable to conclude that as a matter of law punitive damages are not recoverable.

681 F. Supp. at 397-98.

The issue of notice requirement under Miss. Code Ann. §§ 83-11-5 and 83-11-7 was again addressed in *Gorman v. Southeastern Fidelity Ins. Co.*, 775 F.2d 655 (5th Cir. 1985), which bears a strong factual relationship to the case at bar. The defendant therein denied a claim for damage to plaintiff's automobile after it was totalled in a one-car accident, on grounds that coverage had expired. Plaintiff hired an attorney to contact the defendant, which thereupon paid GMAC the amount due upon the lien. Plaintiff then filed suit alleging tortious breach of contract, breach of fiduciary

duty, and fraud in the inducement, and sought punitive damages. The court below remarkably held that there was a lack of interpretation of the statute requiring notice, and therefore the insurance company would not be held liable for punitive damages.

How ofter can this matter be one of first impression? How many times will insurance companies be allowed wrongfully to deny claims and cite an ambiguity in the statute until that excuse is worn out? The victims of such abuse are people who justifiably relied upon their insurance company, and the legal requirements of the statute, to be notified before their insurance coverage is terminated.

III. THE COURT BELOW MISAPPLIED THE STANDARD ON SUMMARY JUDGMENT

The summary judgment standard has been well-established by this Court, as seen in the following brief review of precedents.

> "Rule 56 of the Federal Rules of Civil Procedure relating to summary judgment should be cautiously invoked to the end that parties may always be afforded a trial where there is a bond fide dispute of facts between them." *Associated Press v. United States,* 326 U.S. 1, 6, 89 L.Ed. 2013, 2022-23 (1954).

"Rule 56(c), Federal Rules of Civil Procedure...authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is and where no genuine issue remains for trial; the rule does not cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 468, 7 L.Ed. 2d 458, 461 (1962).

> "[T]he question of whether summary judgment is appropriate in any case is one to be decided on the particular facts of that case...." *First Nat'l Bank v. Cities Service Co.,* 391 U.S. 253, 259, 20 L.Ed. 2d 569, 575 (1968).

Most appropriate is the following language from a case decided by this court a decade ago: "On summary judgment, the judge appropriately may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred," *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed 2d 396, 410 (1982).

As seen in the above-quoted cases, it was well-established that the insurance company was required by law to send written notice to the plaintiff. As stated in footnote 1 of the opinion below, the District Court determined that the requisite notice was not sent to the plaintiff. As the opinion further states, the said requirement was clear and unmistakable. The court below erred in not allowing the issue of punitive damages to be determined by the trier of act, i.e., the jury.

A party moving for summary judgment has the burden of showing the absence of a genuine material issue of fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L.Ed. 2d 142, 154 (1970); *Weinberger v. Hynson, Westcott & Dunning, Inc.* 412 U.S. 609, 622 n. 18, 37 L.Ed. 2d 207, 219 n. 18 (1973).

The movant must be able to point out the absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L.Ed. 2d 265, 275 (1986); *Atchison, Topeka & Sante Fe Railway Co. v Buell*, 480 U.S. 557, 568 n. 15, 94 L.Ed. 2d 563, 574-75 n. 15 (1987).

The evidence must be viewed in a light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 8 L.Ed. 2d 176, 177 (1962); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L.Ed. 2d 538, 553 (1986).

The judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed. 2d 202, 212 (1986).

In *Anderson*, this Court adjured trial courts to act with caution is granting summary judgment and to deny summary judgment in cases where there is reason to believe that the

better course would to proceed to a full trial. 477 U.S. at 255, 91 L.Ed. 2d at 216.

It is clear that the court incorrectly applied this very clear standard in granting summary judgment to the Respondent on the issue of punitive damages. Even assuming that there were no issues of fact as to the mendacious course of conduct which Respondent MIC took in dealing with their policyholders, as recited in the Statement of Facts above, Respondent was not entitled to judgment as a matter of law on whether punitive damages should be awarded. Indeed, when a company has lied so much as in this case, under the decisions of this Court, the issue of whether punitive damages should be awarded should have been submitted to the jury.

IV. THE COURT BELOW ERRED IN MISAPPLYING THE WELL-ESTABLISHED PRECEDENTS OF THIS COURT REGARDING PUNITIVE DAMAGES

In recent years this Court has had several occasions to address the subject of punitive damages. The purpose, it has been repeatedly stated, is to penalize the tort-feasor for his wrongful action and to deter him and others for similar conduct in the future. *Int'l Broth. of Elec. Workers v. Forest*, 442 U.S. 42, 60 L.Ed. 2d 698 (1979); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 69 L.Ed. 2d 616 (1981); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 91 L.Ed. 2d 249 (1986).

In this regard this Court has been called upon to address constitutional issues which have been raised. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 89 L.Ed. 2d 823 (1986), this Court noted that arguments that imposition of punitive damages violate the Eighth Amendment and Due Process Clause of the Fourteenth Amendment "raise important issues which, in an appropriate setting, must be resolved" but declined to reach those issues. Likewise, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed. 2d 62 (1988), a case from Mississippi, this Court did not make a ruling on similar issues primarily because they had not been raised in the courts below.

Then in *Browning - Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 106 L.Ed. 2d 219 (1989), this Court handled down an opinion that the Excessive Fines Clause of the Eighth Amendment "does not apply to awards of punitive damages in cases between private parties," but deferred ruling on applicability of the Due Process Clause.

About two years later this Court did rule on the Due Process Clause in *Pacific Mutual Life Ins. Co. v. Haslip*,_____U.S._____,113 L.Ed. 2d 1 (1991). That case involved the denial of a hospital claim where coverage had lapsed because the selling agent had pocketed the premium payments and had not sent them into the home office. The company had had problems with this agent before, and should have known of his tendencies. The jury awarded $200,000.00 in compensatory damages, and $840,000.00 in punitive damages.

In *Haslip*, this Court declined to conclude that punitive damages are *per se* unconstitutional. In essence, this Court in *Haslip* reasoned that the constitutionality of an award of punitive damages is a function of two practical considerations: (1) whether the circumstances of the case indicate that the award is reasonable, and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the fact finder.

About the same time as the *Haslip* decision was rendered, this Court remanded to the Fifth Circuit a case in which certiorari had been granted, *Eichenseer v. Reserve Life Ins. Co.*_____U.S._____, 113 L.Ed. 2d 233 (1991), for further consideration in light of Haslip. The Fifth Circuit did thereafter reconsider, and based on its re-analysis, held that punitive damages were not unconstitutional. *Eichenseer v. Reserve Life Inc. Co.*, 934 F.2d 1377 (5th Cir. 1991).

Under Mississippi law, which the court is Erie-bound to follow, an insurance company has the duty to conduct a prompt investigation and to tell its insured the plain truth. *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 276 (Miss. 1985), a case which was affirmed by this Court. When the Respondent in this case did conduct an investigation, albeit after the fact,

it failed in its duty to tell the Petitioners the truth. For this, the Respondent should be liable to a punitive damage instruction.

Bankers Life cites the important case of *Standard Life Ins. Co. of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1978), in which the court eloquently addressed the need for punitive damages in a case such as this:

> If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

354 So. 2d at 248.

When we consider the number of cars that are sold in this country, most of which include as a part of the sale price comprehensive insurance coverage in the event the car is damaged, the urgent need for this Court to review and ultimately reverse the court below becomes all the more apparent. If these insurance companies can get by with adding premium payments to the mortgage payments on cars, and then once the car is damaged, and the policyholders have to hire an attorney and file suit, can be limited only to the actual amount they should have paid in the first place, there is no reason for them to act any more honestly than they did in this case.

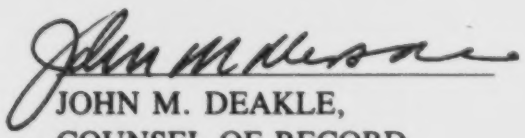
CONCLUSION

It is of utmost importance that this Court grants certiorari in this case. Thousands and thousands of cars are sold in this country every day. Most of them include as a part of the sale price a required policy of comprehensive insurance. When these

premiums are added to the sale price, the customer is unaware that he is buying nothing. If the insurance industry is allowed to continue this practice, and to get away with such devious conduct as they committed in this case this will have a deleterious effect on many citizens of this country. It is therefore of the greatest urgency that this Court grant certiorari in order to allow further development of the facts and to discuss the need for reversal of the court below in its affirmance of the granting of summary judgment to Respondent insurance company on the issue of punitive damages. Insurance companies should not be insulated from such exposure, especially when their conduct is as egregious as it was in this case.

For the above and foregoing reasons, it is respectfully urged that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

APPENDIX "A".

STRICKLAND v. MOTORS INS. CORP. (MIC)

Vickie C. STRICKLAND and Lelland Creel, Plaintiffs-Appellants,

v.

MOTORS INSURANCE CORPORATION (MIC) and General Motors Acceptance Corporation, Defendants,

Motors Insurance Corporation (MIC), Defendant-Appellee.

No. 91—1981.

United States Court of Appeals,
Fifth Circuit.

Sept. 2, 1992.

Purchaser of automobile under installment sales contract that required her to maintain insurance on vehicle sued insurer after it denied coverage following accident. The United States District Court for the Southern District of Mississippi at Hattiesburg, Dan M. Russell, Jr., J., granted summary judgment in favor of insurer. Purchaser appealed. The Court of Appeals held that: (1) under Mississippi law, constructive notice to purchaser that her insurance coverage had lapsed was insufficient to relieve insurer of its statutorily prescribed duty to give purchaser actual notice that her policy was due to terminate, and (2) insurer was not liable for punitive damages, as it interpretation of statute as not requiring notice was arguable or legitimate reason for denying coverage.

Affirmed in part, reversed in part, and remanded.

1. Insurance 229(2.2)

Under Mississippi law, constructive notice to purchaser of an automobile under installment sales contract that her automobile insurance coverage had lapsed was insufficient to relieve insurer of its statutorily prescribed duty to give insured actual notice that her policy was due to terminate. Miss. Code 1972 § 83-11-7.

2. Insurance 602.2(1)

Under Mississippi law, insurer was not liable for punitive damages based on its interpretation of statute as not requiring notice to insured that her policy was due to terminate when she had constructive notice that her policy had lapsed; punitive damages were allowed against insurer only where insurer had no arguable or legitimate reason for denying coverage.

Appeal from the United States District Court for the Southern District of Mississippi.

Before HILL*, KING, and DAVIS, Circuit Judges.

*Senior Circuit Judge of the Eleventh Circuit, sitting by designation.

STRICKLAND v. MOTORS INS. CORP. (MIC)

PER CURIAM:

Appealant Vicki Strickland appeals the district court's findings that she possessed constructive notice that her automobile insurance coverage had lapsed and the court's resulting decision to grant summary judgment in favor of appellee Motors Insurance Corporation. Because we read the Mississippi case law as stating that constructive notice is insufficient to overcome a statutorily compelled requirement of thirty days notice in this situation, we reverse the district court's order granting summary judgment. The district court's denial of Strickland's claim for punitive damages against Motors Insurance Corporation is affirmed.

FACTS

Appellant Strickland purchased an automobile from a Laurel, Mississippi dealer under an installment sales contract in late 1982. The dealer assigned the contract to General Motors Acceptance Corporation (GMAC). Under the sale agreement, Strickland was required to maintain damage insurance on the vehicle. In the event she failed to procure such insurance, the contract gave GMAC the option of buying it for her, passing along the premium payment to Strickland.

At the time of purchase, Strickland obtained "dual coverage insurance" from Motors Insurance Corporation (MIC). (GMAC and MIC are both subsidiaries of General Motors.) The insurance premium for the first year was financed under the original auto purchase contract. Mississippi law prescribes thirty days notice of expiration prior to non-renewal of an insurance policy. Miss. Code Ann. § 83-11-7 (1991). In late 1983, near the time that the policy was due to expires, MIC, under its Finance Renewal Insurance (FIR) plan, notified Strickland of her renewal options.

The FIR plan provides, that where a vehicle is financed by GMAC and insured by MIC, MIC will notify GMAC about policies soon due to expire. Upon receipt of such notification, GMAC will inform MIC which of its policyholders may be offered the option of financing their renewal premium through an increase in their outstanding loan balance, with a corresponding increase in monthly payments already due to GMAC. MIC will then make an offer of renewal to the policyholder in the form of an "extension certificate" at least thirty days prior to the expiration of the policy. In the event of no response from the policyholder, MIC will notify GMAC at least one day prior to expiration in order to allow GMAC to pay the premium, should it so desire.

Strickland made no response to the 1983 extension certificate mailed to her by MIC, and GMAC exercised its option to finance her renewal premium. Strickland was mailed a new payment booklet, with her monthly payments raised to reflect the 1983 premium paid by GMAC. When, in late 1984, the policy was again up for renewal, this same procedure was repeated and another new payment book was mailed to Strickland.

In 1985, however, MIC failed to mail an extension certificate to Strickland.[1] Nor did MIC inform GMAC that the policy was up for renewal and there had

1. This matter was in dispute when this court heard its first appeal from this case, and was the basis for this court's first remand to the district court. Prior to the district's court second hearing of this case, MIC claimed it had mailed the extension certificate to Strickland, and Strickland countered that she had never received it. On remand, however, the dispute was resolved by the district court—MIC did not mail the extension certificate.

been no response from Strickland, which would have allowed GMAC to consider whether to again pay the renewal premium due on Strickland's policy. Consequently, GMAC took no action to finance the renewal, and did not mail Strickland a new payment book as it had done in previous years. On December 29, 1985, MIC treated Strickland's policy as lapsed for non payment of the renewal premium Strickland was not notified of this action. In the meantime, Strickland gave the car and her payment booklet to her brother, with the understanding that he would maintain payments to GMAC. Neither GMAC nor MIC was informed of this arrangement. Five months after the policy lapsed, with payments two months in arrears, the car was wrecked. GMAC repossessed the car and sold it at a private sale. Strickland made demand on MIC for coverage under the policy, which MIC denied, claiming that the policy had lapsed. Strickland filed suit in Mississippi state court against MIC and GMAC, who removed the case to federal court.

PRIOR PROCEEDINGS

This is the second time that this court had heard an appeal in this case. Strickland's suit before the district court alleged breach of duty to keep the car insured, improper repossession and independent bad faith tort claims. The district court granted summary judgment in favor of GMAC and MIC, concluding that neither of the defendants had a contractual duty to maintain insurance on the auto; that GMAC's prior actions under the FIR plan did create a continuing duty to finance the renewal premiums; that GMAC properly repossessed and sold the car; and that plaintiffs were not entitle to punitive damages as they had failed to prevail on the coverage issue. Strickland timely appealed that judgment.

This court, in an unpublished opinion, affirmed the district court's summary judgment with respect to GMAC, but vacated and remanded the judgment with respect to MIC. The panel reasoned that summary judgment was inappropriate as there was a genuine issue of whether MIC had in fact sent the extension certificate; providing notice to Strickland that the policy was due to expire. *See* note 1, *supra*. This court remanded the case to the district court with the instruction that:

If the district court determines that the extenstion certificate was not duly mailed, it should determine whether Strickland had actual or constructive notice or should have known the policy had expired at some point during the five months this premium remained unfinanced and unpaid. *Cf. Estate of Beinhauer v. Aetna Casualty & Surety Co.*, 893 F.2d 782, 786—87 (5th Cir.1990).

On remand, the district court "perceive[d] its only task to be that of assuming, without concluding, that the extension certificate was not duly mailed and thence proceeding to determine, if possible, the existence, if any, of actual or constructive notice."[2] The court concluded that Mississippi law does recognize the doctrine of constructive notice, and that Strickland had received constructive notice that her policy had lapsed.

The district court reasoned that because Strickland admittedly knew she had been

2. The district court's assumption is correct— Production of a "certificate of mailing" establishes a rebuttable presumption that a notice of cancellation has reached its final destination. *Carter v. Allstate*, 592 So.2d 66, 73—74 (Miss1991). The same result should obtain in situations of notice of nonrenewal.

In its first review of this case, this court made note of the fact that MIC did not offer into evidence a "certificate of mailing", and offered no proof that the extension certificate was mailed other than to present testimony that is is the usual practice of the company to do so. Accordingly, MIC never established a presumption that the extension certificate was mailed.

purchasing policies in twelve month increments, and that the policies would not be renewed unless she or someone else paid for such renewal, she had knowledge of facts which were sufficient to impute a legal inference of constructive notice upon her. In reaching this conclusion, the district court relied primarily upon *King Lumber Industries v. Cain*, 209 So.2d 844 (Miss.1968):

> A person having within his knowledge facts which would put him on inquiry as to his personal rights should be charged with notice of such information as such facts and the exercise of ordinary diligence would disclose.
>
> *Id.* at 848.

Finding "overwhelming justification" for the inference that Strickland had constructive notice at some point during the five months from the time the twelve month policy lapsed and the car was wrecked, the court granted MIC's second motion for summary judgment, and this appeal ensued.

ISSUE

Taking the case, as we do, with the factual dispute regarding MIC's failure to send the extension certificate resolved as discussed in note, *supra*, we are presented with the question of whether, under Mississippi law, Strickland possessed sufficient knowledge so that, despite the complete absence of statutorily compelled notice by the insurer, she may nevertheless be said to have received constructive notice that her insurance policy was due to lapse.

DISCUSSION

[1] Mississippi law requires that an insurer provide the insured with thirty days notice of an intention not to renew the policy. Miss. Code §83-11-7 (1991).[3] Strickland's policy with MIC contained a provision which restated this notice requirement. As we are presented with none of the situations which would remove this non-renewal case from a thirty day notice requirement § 83—11—7, MIC was statutorily and contractually obligated to provide her with thirty days notice.[4] Because it is settled that no notice was in fact given by MIC

3. Mississippi law provides for different notice periods in situations of non-renewal and cancellation. Where a policy is canceled for nonpayment of a premium, the insurer is required to provide only ten days notice to the insured. Miss.Code Ann. § 83-11-5 (1990).

4. The Code provides, in relevant part:

> *Non-renewal*
> No insurer shall fail to renew a policy unless it shall mail or deliver to the named insured, at the address shown in the policy, at least thirty (30) days advance notice of its intention not to renew. This section shall not apply:
> (a) if the insurer has manifested its willingness to renew, subject to certain specified conditions which are not met by the insured; nor
> (b) if the insured had manifested its unwillingness to renew; nor
> (c) in the case of nonpayment of premium. □.
> Miss. Code Ann. § 83-11-7 (1991)

Where an insurer has manifested its willingness to renew a policy, subject to the condition precedent that the insured pay the renewal premium, subsection (a), above, removes that situation from this statutory section. MIC, however failed to mail the extension certificate to Strickland and manifest its willingness to renew.

Part C (C) of MIC's policy with Strickland stated that, in the event MIC offered to renew the policy, failure to submit the renewal premium by the prescribed deadline would constitute a refusal of that offer by the insured. Where that offer to renew is made, and the insured does not respond, the insurer is not obligated to supply thirty days notice prior to cancellation. *Estate of Beinhauer v. Aetna Casualty & Surety Co.*, 893 F.2d 782, 785 (5th Cir.1990). This is in acordance with subsection (c), above. However, we are presented with a situation here where there was no offer to renew and no obligation imposed upon the insured to respond.

was statutorily and contractually obligated to provide her with thirty days notice.[4] Because it is settled that no notice was in fact given by MIC to Strickland, we examine whether Strickland received constructive notice.

From the case law which exists on the subject, it appears that Mississippi law does recognize constructive notice in these circumstances. *See Cain, supra*, 209 So. 2d at 848; *McDonald v. East Jasper County School District*, 351 So2d 531 (Miss. 1977). As discussed further *infra*, it may be entirely reasonable to conclude that Strickland had constructive notice that her policy had lapsed. However, whether that constructive notice is sufficient to overcome the statutorily mandated notice requirements of Mississippi Code § 83-11-7 is an altogether different question.

"[I]mplied notice is generally regarded as a kind of actual notice which consists of knowledge of facts so informing that a reasonably cautious person would be led by them to the ultimate fact; that which, if prosecuted with ordinary diligence, will furnish information of the fact." *Cain*, 209 So.2d at 848 (quoting 66 C.J.S. Notice § 5 (1950)).

In *Cain*, the plaintiff sued a lumber company for dividend checks issued to her as a shareholder. The Supreme Court of Mississippi applied the doctrine of implied actual notice and reversed a judgment in the plaintiff's favor. The court found that the plaintiff knew sufficient information about her business affairs to enable her to have learned that her husband had been depositing the dividend checks into their joint account, from which she had drawn large sums of money. The court concluded that it would be "inconceivable that the law would now charge King Lumber Industries with [the plaintiff's] lack of knowledge when the means of knowledge was not only within her possession, but as shown and not disputed, the facts had been openly discussed before her." *Id.; see also Crawford v. Brown*, 215 Miss. 489, 61 So.2d 344 (1952); *Stanley v. Stanley*, 201 Miss. 545, 29 So.2d 641 (1947).

The district court noted that the facts in *Cain* were different from those in the present case, but nonetheless relied upon its statements regarding constructive (actual implied) notice in granting summary judgment in favor of MIC. The most noteworthy of the factual differences between the two cases is the absence of any statutory notice obligation in *Cain*. The district court noted that a more recent case which involved a statutory notice requirement, *McDonald v. East Jasper City School District*, 351 So.2d 531 (Miss.1977), limited the broad language of *Cain*. We find the reasoning of *McDonald* persuasive in the present case.

In *McDonald*, the plaintiff had received constructive notice that his teaching contract would not be renewed by the local district when he was so informed by the principal of the school where he taught. The Supreme Court of Mississippi ruled that this constructive notice could not supersede the specific directive of § 37-9-107 of the Mississippi Code that teachers whose contracts will not be renewed must be given notice by certified mail within seven days of the decision not to renew. The *McDonald* court recognized the doctrine of constructive notice,

but held that strict compliance with the statutory notice requirement was deemed essential if the Public Fair Dismissal Act was to have any meaning. *Id.* at 533, *citing Jackson v. Board of Education of Oktibbeha County, Mississippi*, 349 So.2d 550 (Miss.1977).

The district court distinguished *McDonald*, reasoning that strict compliance with the notice statute in that case was "motivated, if not controlled," by the legislative intent behind the Act. Citing *Jackson*, the district court noted that:

> It is noted that one purpose of the [Public School Fair Dismissal] Act is to give those teachers who are not to be reemployed for the ensuing year early notice of that fact so that they might seek employment elsewhere.... The Act serves a just purpose and was enacted by the legislature to protect those persons enumerated [in the statutory section] from unfair and sometimes vindictive practices of their employers.

Jackson, 349 So.2d at 553.

The reasoning of *McDonald* is more applicable to the present case than that found in *Cain*. Initially, we note that the *McDonald* court specifically addressed whether constructive notice may abrogate a statute's specific notice requirements, an issue not even contemplated in *Cain*. Second, even though the Mississippi Supreme Court has not yet ruled that the notice requirements of § 83-11-7 are mandatory, the reasoning of *McDonald* is, quite simply, directly applicable here. Section 83-11-7's notice provisions reflect an overall legislative intent that motorists secure insurance on their vehicles. *See generally*, Miss. Code Ann. § 83-11-1, *et seq.* (1991). As with the act contemplated in *McDonald*, the notice provision in the insurance statute is necessary to inform motorists whose insurance is not to be renewed that they must obtain insurance elsewhere prior to the termination of their current policies.

In following this court's directives on remand, the district court reached factual findings touching upon whether actual notice had been given and whether constructive notice may have been developed. The district court's inquiry into constructive notice focused upon whether Strickland had received notice sometime during the five months which elapsed *after* the policy lapsed. The purpose of the statutory notice requirement is to enable those motorists who, for whatever reason, will not have their policies renewed by their insurers to procure new insurance *before* the time of lapse. *See Carter v. Allstate*, 592 So.2d 66, 74(Miss.1991). In the absence of a legislative notice requirement, what happened after lapse would not be altogether irrelevant. However, the interests safeguarded by the Mississippi Code necessitate notice well in *advance of* a policy's expiration date.

Forethought and caution might dictate that insured motorists keep a close watch on the expiration date of their policies to avoid inadvertent lapse. However, where the legislature has imposed a notice requirement upon the insurer, the absence of such forethought by the insured is not an adequate foundation to support the suspension of the statutory notice requirement. While Strickland may have received constructive notice here, that notice was not sufficient to relieve MIC of its statutorily prescribed duty under § 83-11-7 to give her actual notice that her policy was due to terminate.[5] Accordingly, the district court's granting of summary judgment in favor of MIC is reversed.

[2] We affirm, however, the district court's denial of punitive damages against MIC. Mississippi's insurance law allows punitive damages only where an insurer has no arguable or legitimate reason for denying coverage. *Gorman v. Southeastern Fidelity Insurance Co.*, 775 F.2d 655, 658 (5th Cir.1985) (*citing Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 841-42 (Miss.1984)). The statutory language here is less than clear and MIC's interpretation of the statute as not requiring notice under these facts does not make it susceptible to punitive damages.

CONCLUSION

The district court's granting of summary judgment in favor of MIC is REVERSED. The district court's denial of punitive damages against MIC is AFFIRMED. The matter is REMANDED for further proceedings in accordance with this opinion.

5. This conclusion is bolstered by the analogous ruling of the Mississippi Supreme Court in *Bankers & Shippers Ins. v. Meridian Naval Federal Credit Union*, 431 S.2d 1123 (Miss. 1983). The court held that, under Mississippi Code Ann. § 93-13-9, an insured's duty to notify a lienholder that a policy will terminate adsent receipt of a renewal premium is absolute and faiiure to provide the notice will continue the policy. We especially note the following: While prudence would indicate that lending institutions keep an accurate file calling their attention to the expiration date on insurance policies, this does not, under our statute, relieve an insurance company of the obligation to notify a lienholder named in the policy.

Id. at 1126.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1981

VICKIE C. STRICKLAND and LELLAND CREEL,

versus **Plaintiffs-Appellants,**

MOTORS INSURANCE CORPORATION (MIC) and GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9/2/92, 5 Cir., 1992, F.2d)

(OCTOBER 7, 1992)

Before HILL, KING and DAVIS, Circuit Judges.*

PER CURIAM:

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as petition for panel hearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having in favor or it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

* Senior Circuit Judge of the Eleventh Circuit, sitting by designation.

s/Carolyn King

United States Circuit Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1981

D.C. Docket No. CAH89-0042(R)

VICKIE C. STRICKLAND and
LEELAND CREEL,

Plaintiffs-Appellants,

versus

MOTORS INSURANCE CORPORATION (MIC) and
GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendants,

MOTORS INSURANCE CORPORATION (MIC),

Defendant-Appellee.

Appeals from the United States District Court for the
Southern District of Mississippi

Before Hill[1], KING, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the district court's granting of summary in favor of MIC is reversed. The district court's denial against punitive damages against MIC is affirmed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

It is FURTHER ORDERED that ear party bear its own costs on appeal.

September 2, 1992

ISSUED AS MANDATE:

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[1]Senior Circut Judge of the Eleventh Circuit, sitting by designation.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OFFICE OF THE CLERK

October 26, 1992

Mr. John M. Deakle
Attorney at Law
P.O. Box 2072
Hattiesburg, MS 39401

No. 91-1981 - STRICKLAND, ET AL. -vs-
MOTORS INSURANCE CORP., ET AL.
USDC # CA-H89-42(R)

MANDATE STAYED TO AND INCLUDING
NOVEMBER, 22, 1992

This Court has this day granted a stay of issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

RICHARD E. WINDHORST, JR., Clerk

BY: _____
Deputy Clerk

Enclosures
cc: Mr. D. Gary Sutherland

APPENDIX "E"

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits: Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may ot rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must be set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

APPENDIX "F"

§ 83-11-5. Notice of cancellation.

No notice of cancellation of a policy to which Section 83-11-3 applies shall be effective unless mailed or delivered by the insurer to the named insured at least thirty (30) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given. Unless the reason accompanied or is included in the notice of cancellation, the notice of cancellation shall state or be accompanied by a statement that upon written request of the named insured, mailed or delivered to the insurer not less than fifteen (15) days prior to the effective date of cancellation, the insurer will specify the reason for such cancellation.

This section shall not apply to renewal.

APPENDIX "G"

§ 83-11-7. Non-renewal.

No insurer shall fail to renew a policy unless it shall mail or deliver to the named insured, at the address shown in the policy, at least thirty (30) days' advance notice of its intention not to renew. This section shall not apply:

(a) If the insurer has manifested its willingness to renew, subject to certain specified conditions which are not met by the insured; nor

(b) if the insured has manifested its willingness to renew; nor

(c) in case of nonpayment of premium; nor

(d) in case of failure to make timely payments of dues to, or maintain membeship in good standing with, a designated association, corporation, or other organization where the original issue of such policy or renewal was dependent upon such membership; provided that, notwithstanding the failure of an insurer to comply with this section, the policy shall terminate on the effective date of any other insurance policy with respect to any automobile designated in both policies.

Renewal of a policy shall not constitute a waiver or estoppel with respect to grounds for cancellation which existed before the effective date of such renewal, and if a policy shall be cancelled as authorized by this article prior to such policy's renewal such cancellation shall terminate any right of renewal conferred by this article.

APPENDIX "H"

§ 83-11-9. Proof of notice.

Proof of mailing of notice of cancellation, or of intention not to renew, or of reasons for cancellation to the named insured by certificate of mailing, at the address shown in the policy, shall be sufficient proof of notice.

(2)

Supreme Court, U.S.
FILED
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No. 92-1058

In The

Supreme Court of the United States

October Term, 1992

VICKIE C. STRICKLAND and LELAND CREEL,

Petitioners,

v.

MOTORS INSURANCE CORPORATION (MIC),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In affirming summary judgment on an issue of state law in this diversity case, did the federal court below improperly preempt the Petitioners from invoking the decisional law of the State of Mississippi, and thereby deprive Petitioners of their Seventh Amendment right to trial by jury?

2. When an insurance company has an arguable reason for refusing to pay a claim on a policy which it may have failed to notify the policyholder was being canceled, should the issue of punitive damages be submitted to the jury?

3. Did the court below correctly apply this Court's standard of review on summary judgments and punitive damages?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below, as required by Rule 24.1(b) of the rules of this court.

1. Vickie C. Strickland, Plaintiff-Appellant in the court below;

2. Leland Creel, Plaintiff-Appellant in the court below;

3. Motors Insurance Corporation (MIC), Defendant-Appellee in the court below.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, Motors Insurance Corporation (MIC), respectfully requests that this Court deny the petition for a writ of certiorari.

COUNTER-STATEMENT OF THE CASE

A comprehensive and accurate statement of the facts and prior proceedings in this case is set forth in the Fifth Circuit's opinion, attachment "A" of the appendix to the petition for a writ of certiorari.

In presenting their version of the case, however, the petitioners raise certain matters which are not germane to the Fifth Circuit's decision, and they represent those matters as absolute facts, even though the "facts" are merely their contentions. In this regard, the petitioners maintain that on several occasions, MIC lied about having sent Ms. Strickland one or more notices pertaining to the renewal of insurance for the year 1986. Far from being a "fact", though, this assertion that MIC lied is nothing more than a contention by the petitioners. Specifically, there has never been any findings or admissions in the record to support the petitioners' assertion that "[t]his letter [R. 785], in its entirety, was false and was known to be false at the time it was written by respondent MIC. (pet. p. 4). When this case is once again before the district court, MIC can and will demonstrate that it did not lie or misrepresent any facts, and that it sent Ms. Strickland the requisite statutory notice.

The petitioners also incorrectly suggest that in footnote 1 of its opinion (pet. app. A2), the Fifth Circuit finds that the district court conclusively decided MIC did not mail an extension certificate to Ms. Strickland. No such finding is made, however, and that fact is clarified in the body of the Fifth Circuit's opinion, where the Court notes that "the district court 'perceive[d] its only task to be that of assuming, without concluding, that the extension certificate was not duly mailed and thence proceeding to determine, if possible, the existence, if any, of actual or constructive notice.' " (pet. app. A3).

This explanation of the district court's approach is taken directly from the district court's opinion:

> It is this Court's opinion that the [Fifth Circuit], having before it the record that was before this Court, concluded that whether the defendant actually mailed the extension certificate so as to be in compliance with either Miss. Code Ann. § 83-11-1 **et seq.**, or the policy MIC issued to Strickland, is a jury question.
>
> Based on the aforesaid conclusion, this Court perceives its only task to be that of assuming, without concluding, that the extension certificate was not duly mailed and thence proceeding to determine, if possible, the existence, if any, of actual or constructive notice.

(R. 1218).

It is thus clear that the Fifth Circuit, like the district court before it, merely assumed, for purposes of it own analysis, that MIC had not mailed the extension certificate. The Fifth Circuit did not make any finding on that issue – one way or another. It also did not make any finding about whether MIC failed to comply with any other statutory notice requirement. In the decisions by both the district court and the Fifth Circuit, the question of whether MIC gave the requisite statutory notice is simply reserved for the jury.

That, of course, is why the petitioners' contentions about MIC lying and not giving notice or making an offer of renewal are not germane to the Fifth Circuit's decision: those contentions pertain to the issue of whether MIC complied with applicable statutory notice requirements, but the Fifth Circuit does not address that issue in its decision. It instead addresses questions of "constructive" notice. It decides whether the existence of "actual" or

"constructive" notice excuses an insurer from a possible failure to comply with the notice requirements of an applicable insurance statute.

After resolving that question against MIC, however, the Fifth Circuit still concludes that MIC is entitled to a summary judgment on the petitioners' claim for punitive damages. The Fifth Circuit correctly holds that since the language of the applicable Mississippi statute is less than clear, MIC had an arguable or legitimate reason for construing "actual" or "constructive" notice as an exception to that statute under the facts of this case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. STRICKLAND'S CLAIM THAT SHE WAS IMPROPERLY DEPRIVED OF HER SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY WAS NOT RAISED BELOW, IS WITHOUT MERIT AND IS AN OTHERWISE INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT.

In their petition for a writ of certiorari, the petitioners contend that the Fifth Circuit, in affirming summary judgment on the issue of punitive damages, improperly pre-empted them from invoking the decisional law of the State of Mississippi and thereby deprived them of their Seventh Amendment right to trial by jury. The petitioners, though, never presented such an issue to the Fifth Circuit, either in their original brief, their rebuttal brief, their oral argument, their petition for rehearing or their petition for rehearing en banc. The petitioners also failed to raise that issue in the district court. Since

neither of the lower courts passed on the question, certiorari should not be granted to review it. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977) (where issue not pleaded, argued or briefed in district court or Court of Appeals, Supreme Court would not grant certiorari to consider it); *Tennessee v. Dunlap*, 426 U.S. 312, 316 (1976) (claim not pleaded in complaint or considered by either district court or Court of Appeals is not before Supreme Court on certiorari).

The position which the petitioners have taken on this issue is also without merit. The reason the petitioners are being deprived of a jury trial on their claim for punitive damages is simple: the district court awarded MIC a summary judgment on that claim and the Fifth Circuit upheld that decision. A summary judgment, however, does not violate the Seventh Amendment. Summary judgments were deliberately designed to remove claims from a jury.

For their part, moreover, the petitioners readily acknowledge that in appropriate instances, summary judgments can and should be granted on claims for punitive damages. (pet. p. 8). So there is no issue over whether the Fifth Circuit improperly deprived the petitioners of a jury trial by upholding the summary judgment awarded to MIC on the punitive damages claim. The petitioners' suggestion to the contrary is completely lacking in merit.

But the petitioners are using that constitutional window dressing to deflect attention from the real issue. The real issue, of course, is not whether the petitioners have been improperly deprived of a right to trial by jury, but

whether the Fifth Circuit properly awarded a summary judgment to MIC under the facts of this case and applicable Mississippi law.

Attention is being deflected from that issue, since it does not present an appropriate question on which to grant certiorari. In order to reconsider the propriety of the summary judgment upheld by the Fifth Circuit, this Court would not only have to engage in an extensive canvassing of the facts, but it would also have to make an extensive evaluation of Mississippi law governing punitive damages in insurance disputes. The petitioners are claiming, for example, that the Fifth Circuit misconstrued Mississippi law by following and applying its own prior decisions interpreting the law of Mississippi, rather than the decisions of the Mississippi Supreme Court.

But the interpretation of state law and fact canvassing are not tasks to be served by a grant of certiorari. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 507 (1969); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 537 (1957); *United States v. Johnson*, 268 U.S. 220, 227 (1925). The petitioners' writ should be denied for those reasons as well.

II. STRICKLAND'S CLAIM THAT MISSISSIPPI LAW ON THE PERTINENT NOTICE QUESTION WAS CLEAR AND WELL ESTABLISHED IS WITHOUT MERIT AND IS ALSO AN INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT

In section II of the petitioners' legal argument, they maintain that the Fifth Circuit erred in treating this as a case of first impression. They contend that contrary to the

Fifth Circuit's holding, there was clear and well settled Mississippi law on the pertinent notice issue. To support this position, they cite a number of allegedly applicable cases in their petition for a writ of certiorari.

But the cases cited and relied upon by the petitioners are inapplicable. Those cases address the notice requirements imposed by various Mississippi statutes. The pertinent notice issue addressed in the Fifth Circuit's decision, however, does not involve statutory notice requirements.

The Fifth Circuit was not concerned with whether MIC had complied with certain statutory notice provisions. It focused, instead, on whether the doctrine of constructive notice can be applied in Mississippi to this type of insurance dispute, so as to excuse any failure to satisfy the notice requirements set forth in the statutes. Like the district court before it, the Fifth Circuit merely assumed, solely for the sake of its own analysis, that MIC had not complied with certain statutory notice provisions. It then examined whether MIC was entitled to a summary judgment anyway under the doctrine of constructive notice.

The Fifth Circuit ultimately concluded that constructive notice is not available in this type of insurance dispute, but, in doing so, it correctly found that the doctrine's applicability to such a situation had not been previously considered in a reported decision. The petitioners, moreover, are not disputing that fact. They have failed to cite any Mississippi case addressing the applicability of constructive notice to the type of insurance dispute present here.

The petitioners, therefore, are completely incorrect in contending that Mississippi law on the pertinent constructive notice issue was clear and well settled. In addition, the petitioners also have no basis for asking this Court to review the issue. In order to reexamine that question, this Court would have to engage in an extensive interpretation of state law, something which is not a task to be served by a grant of certiorari. *Birtcher Corp. v. Diapulse Corp. of America*, 17 L.Ed.2d 43, 87 S.Ct. 6 (1966).

III. STRICKLAND'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED THE SUMMARY JUDGMENT STANDARDS IS WITHOUT MERIT AND IS AN OTHERWISE INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT

In section III of their argument, the petitioners maintain that the Fifth Circuit failed to apply the appropriate standard in granting a summary judgment on the issue of punitive damages. Although the petitioners cite numerous cases on the standards for awarding a summary judgment, they completely fail to explain how the Fifth Circuit misapplied any of those standards. In addition, in the final paragraph of section III, the petitioners plainly reveal that they are not actually complaining about the alleged misapplication of the summary judgment standards. Rather, their real complaints are based on the Fifth Circuit's assessment of the facts and its application of the Mississippi law on punitive damages in insurance disputes.

Consequently, in order to review the true issues presented by the petitioners, this Court would have to construe Mississippi law and engage in extensive fact canvassing. This Court has ruled on numerous occasions, however, that it should not grant a writ of certiorari merely to review the evidence, discuss the facts and interpret state law. *Berenyi v. Immigration Service*, 385 U.S. 630, 636 (1980); *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 537 (1957).

IV. STRICKLAND'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED WELL ESTABLISHED PRECEDENTS OF THIS COURT REGARDING PUNITIVE DAMAGES LACKS MERIT AND IS OTHERWISE INAPPROPRIATE FOR REVIEW BY THIS COURT

In section IV of their argument, the petitioners maintain that the Fifth Circuit failed to follow this Court's precedents on punitive damages. They then cite and briefly explain a number of this Court's cases on the constitutional aspects of punitive damage awards. Thereafter, the petitioners never attempt to explain how the Fifth Circuit failed to follow any of those decisions. Instead, they shift to a discussion of Mississippi law and the facts of this case, and, for that reason, this Court should not grant certiorari to engage in fact canvassing and the interpretation of state law.

This is, moreover, the first time that the petitioners have presented this issue for review. Since they failed to raise the issue in either the district court or the Court of Appeals, certiorari should not be granted to review it.

Miree v. DeKalb County, Georgia, 433 U.S. 25, 33-34 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 (1976).

V. THE DECISION OF THE FIFTH CIRCUIT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER, DOES NOT DECIDE A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT; NOR HAS IT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S JUDICIAL DISCRETION

Under Rule 10 of the Supreme Court Rules, a petition for a writ of certiorari is a matter of judicial discretion, and it will only be granted for special and important reasons. Rule 10 then cites several reasons which warrant a granting of the writ, but none of those reasons apply to this case. First, the Fifth Circuit's decision is not in conflict with a decision by another federal court of appeals. Second, the Fifth Circuit's decision does not decide a federal question in a way which conflicts with a decision by a state court of last resort. Third, the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings. There has certainly been no obvious or exceptional showing of error.

For these reasons, there is no important or compelling reason for this Court to accept review of this case and reexamine the facts which have already been thoroughly examined by the district court and the Fifth Circuit. There is no important legal controversy at stake, nor are there any constitutional questions at issue. Rather,

this case turns solely on its own facts and has no importance other than to the litigants themselves.

CONCLUSION

The petitioners in this action wish to have this case heard solely on the issue of whether they are entitled to punitive damages under the facts of this case. But both the district court and the Fifth Circuit, in denying punitive damages to the petitioners, correctly applied appropriate Mississippi legal standards and reached a correct result. For the foregoing reasons, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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